

# Chapter I.

## GENERAL DEFINITIONS

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Terms in these General Orders are used in conformity with Title 28 of the United States Code, the Federal Rules of Appellate Procedure, and the Rules of the United States Court of Appeals for the Ninth Circuit, unless otherwise indicated.

**1.1. "Active judge"** - means a circuit judge of this circuit in regular active service.

**1.2. "Senior judge"** - means a circuit judge of this circuit who has retired from regular active service pursuant to 28 U.S.C. § 371(b) or 28 U.S.C. § 372(a).

**1.3. "Member of the court"** - means an active judge or a senior judge; in the plural, it means all active judges and senior judges, collectively.

**1.4. "Visiting judge"** - means any judge or justice of the United States, not a member of the court, designated, pursuant to 28 U.S.C. §§ 291-96, to act as a member of a panel to hear and decide a case.

**1.5. "Judge"** - without qualification, means an active judge, senior judge, or a visiting judge as the context may require.

**a. "Administrative judge"** - means the most senior eligible active judge willing to serve, not including the Chief Judge, in an administrative unit.

Any active judge is eligible to serve as an administrative judge; service is to be in order of seniority, except that no judge is qualified to serve after becoming 65; the term of office shall be three-years, non-renewable; and incumbents are grandparented for three years commencing July 1, 1991.

**1.6. "Panel"** - means a division of more than one judge of this court to which a case or motion is referred for disposition.

**1.7. "Disposition"** - means an opinion, memorandum, or order of the court, without regard to the distinctions set forth in 9th Cir. R. 36-1.

**1.8. "Appellate Commissioner"** - means an officer appointed by the court to rule or review and make recommendations on a variety of nondispositive matters, such as applications by appointed counsel for compensation under the Criminal Justice Act and certain motions specified in Chapter Six of these orders, and to serve as special master as directed by the court.

**1.9. "Staff Attorney"** - means an attorney appointed by the court to assist in the processing of appeals and motions and to perform such other duties as the court directs.

**1.10. "Circuit Mediator"** - means an attorney employed by the court to facilitate the settlement of cases and to perform such other duties as the court directs. Circuit mediators are also known as "conference attorneys."

**1.11. "Administrative Unit"**

Pursuant to 28 U.S.C. § 41, three administrative units are established: the Northern Unit, composed of the districts of Alaska, Idaho, Montana, Oregon, Eastern and Western Washington;

The Middle Unit, composed of the districts of Arizona, Nevada, Hawaii, Guam, Northern Mariana Islands and Northern and Eastern California; and

The Southern Unit, composed of the districts of Central and Southern California.

**1.12. "Comeback Cases"** - means subsequent appeals or petitions from a district court case or agency proceeding involving substantially the same parties and issues from which there previously had been a calendared appeal or petition.

## Chapter II.

### FILING & DOCKETING APPEALS

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#### **2.1. Inquiry Regarding Related Matters**

The Clerk shall add to the usual letter acknowledging the docketing of an appeal an inquiry as to whether the appeal relates to any pending or previously appealed matter, and a direction that, if it does so relate, the Clerk shall be immediately advised of the identity of the related matter.

#### **2.2. Proceedings In Forma Pauperis**

With respect to proceedings in this court in forma pauperis pursuant to 18 U.S.C. § 3006A, 28 U.S.C. § 1915, and Fed. R. App. P. 24, the appointment of counsel by the trial court to represent the appellant on appeal shall create a rebuttable presumption of pauper status for the purpose of dispensing with the docket fee in this court. This presumption may be challenged by the appellee, or by the court on its own motion, when it appears that the appellant may not be a pauper. Unless challenged, however, the presumption shall cure, for accounting purposes, any administrative failure by the district court to supply documents in support of pauper status.

### **2.3. Orders Fixing Time Schedules**

Circuit Rule 42-1 provides for dismissal if records, docket fees, or appellant's briefs are not timely filed. All clerk's orders fixing time schedules for filing records, payment of fees and appellants' briefs shall include specific notice that Circuit Rule 42-1 will be strictly enforced.

In situations where the failure to prosecute involves the failure to file the opening brief, the clerk shall follow the following procedures:

**(a) civil appeals**

If appellant or appellant's counsel fails to file the opening brief for a civil appeal according to the time schedule or within an extension of time granted by the court, the clerk shall dismiss the appeal no sooner than fourteen days after the brief's due date has passed.

**(b) direct criminal appeals (appointed counsel)**

Where the opening brief in a direct criminal appeal is not timely filed, the clerk shall issue a default order instructing counsel to correct the deficiency within fourteen days and file a motion for relief from default. The default order shall warn counsel that failure to respond to the order in a timely fashion will result in counsel being relieved of his/her appointment. The default order will further

require the United States Attorney to serve a copy of it on defendant at his/her current address.

In the event counsel is relieved pursuant to this section, a copy of the order shall be served on the appointing authority.

These same procedures shall apply to habeas cases in which counsel is appointed under the Criminal Justice Act, except the default order will require the state attorney general to serve a copy of it on the petitioner at the current address.

**(c) direct criminal appeals (retained counsel)**

In instances involving retained counsel, the default order shall warn counsel that if no timely response is filed, the client will be informed of counsel's failure to prosecute and directed to take appropriate action such as engaging new counsel or proceeding pro se.

**(d) direct criminal appeals (pro se appellants)**

The clerk shall refer, upon opening and/or where no opening brief is filed, all direct criminal appeals involving pro se appellants directly to the motions attorneys for action consistent with this section.

In all instances where appellant fails to respond to a default order described in (b) and (c) above, the matter shall be referred to the next available motions panel for disposition consistent with this section.

In instances of failure to prosecute other than failure to file the opening brief or respond to an order to show cause, the clerk may issue a default order directing appellant to correct the deficiency and, if appropriate, file a motion for relief from default. If appellant in a civil appeal fails to comply with the default order, the clerk shall dismiss the appeal without further notice. If appellant in a direct criminal appeal fails to respond within the time set out, the matter shall be referred to the next available motions panel for appropriate action.

#### **2.4. Motions for Reinstatement**

Any motion to reinstate an appeal dismissed for want of prosecution shall indicate how the deficiency has been corrected or explain why correction is impossible. Motions to reinstate shall be granted only upon a showing of extraordinary and compelling circumstances.

Motions shall be filed within fourteen (14) days from the entry of the dismissal order; motions filed by incarcerated pro se litigants shall be filed within twenty-eight (28) days from the entry of the dismissal order. If, in the judgment of the court, conditions existed that prevented the timely filing of a motion to reinstate, the court may waive the time limit for the filing of the motion. However, any such waiver shall be granted only upon a showing of extraordinary and compelling circumstances outside the control of the litigant or counsel.

## **Chapter III.**

### **CALENDARING**

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#### **3.1. Time and Place of Court Calendars**

##### **a. Places of Hearings**

It is policy of the court that, in general, there shall be court calendars each year in the following places: twelve in San Francisco; twelve in Pasadena; twelve in Seattle; six in Portland; two in Honolulu; and one in Anchorage. Court calendars may be set in other locations within the circuit when necessary or convenient. The Portland and Seattle calendars may be combined for purposes of convenience or economy.

##### **b. Number of Panel Sitzings per Calendar**

Each court calendar shall consist of as many panel sittings during one or two consecutive weeks as may be deemed appropriate in view of the number of cases ready for hearing, equalizing the backlog of each administrative unit of the court, the availability of judges, clerk's personnel, and courtroom facilities, recognized court holidays, and convenience of travel.



### **3.2. Assignment of Judges to Calendars**

After the time and place of calendars have been established by the Clerk's Office, members of the court and visiting judges shall be assigned to particular days on the calendars. Through the use of a computer program, the Clerk's Office shall attempt to equalize the load among all judges, taking into account the following factors:

#### **a. Composition of Panels**

All panels, except written screening panels, shall be composed of no less than two members of the court, at least one of whom shall be an active judge at the time the panel is drawn.

#### **b. Assignment of Active Judges**

Every year, each active judge, except the Chief Judge, is expected to hear eight monthly calendars of five panel sittings each, exclusive of en banc hearings, motions, oral screening panels, three-judge district court cases, and cases for which a judge's name is drawn by lot, including death penalty cases. With the approval of the Executive Committee, the Chief Judge may hear fewer monthly calendars than active judges.

**c.     Assignment of Senior Judges**

Senior judges are given a choice as to the number of panels on which they will serve and are not calendared for hearings away from their home stations unless they are willing. Senior judges who wish to hear cases in particular locations are accommodated to the extent consistent with the other factors listed in this section. However, they may be required to accept a full load of panel assignments in those locations. Within the context of this subsection "panel" refers to the panel of judges hearing cases in a given location over the course of a sitting.

**d.     Rotation of Judges**

Insofar as possible, each active judge should sit with every other active and senior judge approximately the same number of times over a two-year period.

**e.     Parity in Panel Sitzings**

Insofar as possible, over a two-year period, each active judge should sit on approximately the same number of panels in San Francisco, Pasadena, Seattle/Portland as each of the other active judges, and, over a span of several years, each active judge should sit on approximately the same number of panels in Honolulu and Anchorage as each of the other active judges.

**f. Preferences of Judges**

Insofar as possible, the wishes of each judge with regard to sitting during particular months and on particular days during any calendar shall be accommodated. Absent extraordinary circumstances, however, all active judges should sit for the full hearing week.

**g. Unavailability**

Each member of the court shall inform the Clerk of court as far in advance as possible of his or her unavailability for assignment to a calendar. Each member of the court has the option to exchange days of sitting with another member of the court upon mutual agreement and with the approval of the Chief Judge. Exchanges of assignments shall normally be accomplished at least 60 days in advance of the hearing week. Although the Clerk's Office may be consulted and must be notified of any exchanges, arrangements for exchanges shall be made by direct contact between the members of the court. The Clerk shall circulate to all judges a quarterly report on exchanges.

If a member of a three-judge panel becomes unavailable by reason of death, disability, or departure from the court and the case is under submission, the Clerk shall draw a replacement by lot.

**h. Disqualification**

In the event a judge disqualifies or recuses himself or herself from a case, the Clerk shall try to find a replacement by switching cases or judges with panels in the same location. If unsuccessful, the Clerk shall draw a replacement name by lot as provided in subsection 3.2.j. In rare instances, argument of the case may be postponed until the next calendar.

**I. Overburdens**

If a member of the court falls behind in preparing dispositions, the Chief Judge may determine that the judge should be relieved of further calendar duties until he or she becomes more current. A prima facie case for relieving a judge exists when one or more of the following criteria are met:

- (1) two or more cases not presently in circulation were assigned to the judge for preparation of a disposition over nine months earlier;
- (2) five or more cases not presently in circulation were assigned to the judge for preparation of a disposition over six months earlier;
- (3) fifteen or more cases not presently in circulation were assigned to the judge for preparation of a disposition over three months earlier.

The judge may rebut the prima facie case by showing either that within one month or less he or she will no longer meet any of the criteria or that there is good

cause for remaining on calendar. The Chief Judge may alternatively assign the judge to fewer panels rather than relieve him or her of all calendar duties.

A judge may also request to be relieved of his or her administrative duties.

Calendar relief is not appropriate to compensate for a judge's increased workload that results from sitting with the district court.

**j. Urgent Matters**

In an extraordinary matter which requires immediate consideration and cannot be handled by the appropriate panel, the Clerk, to the extent possible shall constitute a panel by the drawing of names of available judges by lot. Once a judge's name has been drawn, it shall be eliminated from the pool until such time as the pool has been exhausted. However, if the judge whose name is so drawn is unavailable for service, his or her name will be returned to the pool.

**k. Temporary Calendar Reduction**

Any active judge having completed seven years of service with the court may request a one-year reduction to five (5) monthly calendars with three (3) consecutive months without any calendar duties. The Chief Judge may grant the request if the judge's disposition backlog is reasonably current. Requests shall be granted in order of seniority, but no more than three (3) active judges may take

such a reduction with a given year. Any judge granted such reduction shall be ineligible for a subsequent grant for seven (7) years. *(New, 9-18-02)*

### **3.3. Assignment of Cases to Calendars**

#### **a. Number of Panels Sitting**

At least nine weeks before each calendar, the Clerk's Office shall determine the number of panels that are to be included in the calendar. The Clerk's Office shall identify the judges who have been designated for the panels and, to the extent possible, the districts of any Ninth Circuit district judges who will be sitting on the various panels.

#### **b. Selection of Cases for Calendars**

Cases ready for submission to a panel shall be screened by case management attorneys, who shall designate issues, identify cases with similar issues, and assign a numerical weight to each case. Drawing upon a computerized file of such cases, the Clerk's Office shall compile as many clusters of cases as there are panels designated for sittings. Cases in each cluster shall have the same numerical weight total. The total shall be established by the court as appropriate for any one panel. In compiling the clusters, the Clerk's Office shall respect, to the extent possible, the priorities set forth in the following subsection.

**c. Priorities**

Generally, cases are selected for calendaring according to the order in which the notices of appeal, petitions, or applications for enforcement were filed, except that priority is given to direct criminal appeals, state death penalty appeals, and to civil appeals having statutory priority. A case may also be advanced in calendaring by up to six months in order that it may be heard at the same time as a case that involves the same legal issues and that has been included in a case cluster previously compiled. State death penalty and direct criminal appeals are given priority over all other cases. There is no ordering among civil cases entitled to priority. Calendaring of nonpriority civil cases is not delayed without limit to accommodate priority cases. A single judge or panel may order calendaring of any particular case to be expedited. (See, subsection 3.3.g. See also, Circuit Rule 34-3, Priority Cases.)

**d. Assignment of Case Clusters to Panels**

Eight weeks before each calendar, the Clerk's Office shall compile the case clusters. The Clerk shall then assign the case clusters to the panels that will be sitting, without regard to which judges are sitting on the panels. After initial assignment, the Clerk may reassign individual cases based on: (1) a judge's

conflicts of interest, and (2) the court policy against allocating to a panel on which a district judge is sitting any appeal from that judge's district.

**e.     Subsequent Proceedings in Calendared Cases**

Except as set forth in section 6.10, once a case has been assigned to a specific panel and the calendar described in subsection 3.3.d is mailed to the members of the court, that panel shall have responsibility for all further proceedings in the case, unless it directs otherwise. If it comes to the attention of a motions panel to which a motion for reconsideration has been referred that the case has been assigned to a specific panel, the motions panel shall contact the members of that panel before disposing of the motion.

**f.     Exchange of Assignments**

A judge who desires to be relieved of a panel assignment after the calendar and allocation of cases thereto have been distributed to the court may do so by exchanging assignments with another member of the court or visiting judge in accordance with the provisions of 3.2.g.

When an exchange is made less than 30 days from the hearing week, the judges exchanging shall, at the option of the presiding judge, be responsible for bench memo assignments notwithstanding the exchange. The Clerk of Court must be notified of any exchanges.



**g. Expediting Appeals**

Notwithstanding the foregoing provisions, a single judge or panel may order that an appeal be expedited and that it be calendared for argument at a particular time or place.

**h. Adding Cases to Calendars**

If a case must be added to a calendar after notices of scheduled hearings have been sent to the court and parties, the Clerk, with the permission of any affected panel, shall add the case to an existing panel. If this cannot be done without overburdening the panel, a special panel may be convened pursuant to subsection 3.2.j.

**I. Calendaring Policy**

Any exceptions to the court's calendaring policies shall be directed to the Chief Judge.

**3.4. Notification of Calendaring of Cases**

About one month before oral argument, parties shall be notified of the time and place of the hearing of their cases. This information may also be made available to the general public.

If a panel decides not to hear oral argument, the parties should be notified at least twelve days before the scheduled date of argument. However, such notices may by necessity be issued any time before the scheduled hearing.

### **3.5. Publication of Calendars**

The composition of panels shall be made public on the first working day of the week preceding argument. Calendars shall be posted in the San Francisco, Pasadena, and Seattle offices of the Clerk of the Court of Appeals and shall be forwarded to the clerks of the district courts of the circuit with a request that the calendar be posted. Only under exceptional circumstances will the court consider motions for continuances filed within 14 days of the hearing date. (See, Circuit Rule 34-2.)

### **3.6. Comeback Cases - Northern Mariana Islands**

After an argument calendar panel has acted upon an appeal from either Guam or the Commonwealth of the Northern Mariana Islands, the panel should not refuse a return case from Guam or the Northern Mariana Islands unless the case is obviously one in which the research efforts of the original panel have no bearing on any issue presented in the return appeal after remand, or, unless it is impossible to reconvene the original panel.

### **3.7. Comeback Cases** *(New, 7/1/2002)*

When a new appeal is taken to this court from a district court or agency decision following a remand, the calendaring staff shall notify the panel that remanded the case that the new appeal is pending. The notification shall contain a brief description of the issues presented. If the issues predominantly involve the interpretation and application of the original panel decision, the panel in its discretion shall consider the time and manner of submission and notify the staff whether it will accept the appeal. If the new appeal presents no issues that would benefit from the earlier panel research, or if it is impossible to reconstitute the panel, then the panel has no obligation to accept jurisdiction of the appeal. If the appeal is one that would not ordinarily be submitted on the briefs by a randomly drawn panel without oral argument, and if oral argument cannot be timely and conveniently calendared, then, in its discretion, the panel may reject the appeal. In the exercise of its discretion to accept or reject a return appeal, the panel should balance its convenience with that of the other judges of the court, with due regard to the interests of the litigants in a timely and appropriate disposition.

**Note:** Capital cases are governed by Circuit Rule 22-2(c), which states, “that once a capital case is assigned to a panel it retains jurisdiction for all future appeals.”

### **3.8. Oral Argument in Pro Bono Project Appeals**

If an appeal has been selected for inclusion in the court's Pro Bono Representation Project and pro bono counsel has been appointed, the panel shall not submit the case on the briefs, but shall hear oral argument unless pro bono counsel withdraws or consents in writing to submission on the briefs.

When a case has been selected for inclusion in the project, the case management attorneys will revise the inventory card to notify the panel that the case should not be submitted on the briefs.

## **Chapter IV.**

### **DISPOSITIONS**

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#### **4.1. Prevention of Conflicts**

##### **a. Questions Pending Concurrently Before Two or More Panels**

Whenever an author of a proposed disposition knows that the disposition may decide a question pending concurrently before one or more other panels of the court, the author shall circulate copies of the proposed disposition to all members of such other panels. The author shall include a memorandum explaining the purpose of the circulation and setting a fourteen-day time period within which a response, if any, will be expected.

The panel which first takes the issue under submission has priority. All other panels before which the issue is pending that know of another panel's priority shall enter an order vacating or deferring submission pending a decision by the first panel. If the first panel defers or withdraws submission, the concerned panels shall confer to determine which panel will dispose of the issue.

**b. Deferring Submission Pending Decision by Another Court**

Whenever a panel decides to defer or vacate submission pending decision in another case before another court or administrative agency, the panel shall enter an order identifying the case by name and number and the court in which the decision is pending.

**4.2. Deciding Cases on Points Not Raised and Argued**

If a panel determines to decide a case upon the basis of a significant point not raised by the parties in their briefs, it shall give serious consideration to requesting additional briefing and oral argument before issuing a disposition predicated upon the particular point.

**4.3. Writing of Dispositions**

An opinion should be written only if the panel deciding the case specifically determines that a published decision is necessary. A determination shall be made initially at the conference after argument or submission and in any case before the disposition is drafted.

**4.3.a. Memoranda Dispositions**

A memorandum disposition cannot be cited as precedent. Unlike an opinion for publication which is designed to clarify the law of the circuit, a memorandum disposition is designed only to provide the parties and the district court with a

concise explanation of this court's decision. Because the parties and the district court are aware of the facts, procedural events and applicable law underlying the dispute, the disposition need recite only such information crucial to the result.

Accordingly, all that is necessary is a statement such as the following:

Defendant's statements were volunteered rather than made in response to police questioning, and were therefore admissible. United States v. Cornejo, 598 F.2d 554, 557 (9th Cir. 1979). AFFIRMED.

#### **4.4. Suggesting Changes to Draft Dispositions**

When a member of a panel suggests a change in a draft disposition to the authoring judge, the judge should, whenever possible, submit proposed language incorporating the suggestion.

#### **4.5. Filing of Dispositions**

##### **a. Majority, Concurring, and Dissenting Dispositions**

Except for decisions from the bench, the determination of each appeal, administrative review proceeding, and original writ proceeding shall be evidenced by a written disposition concurred in by a majority of the panel assigned to act thereon. The disposition shall indicate the district court or agency and court of appeals docket numbers, district judge whose decision is being appealed, date and city of argument, date of submission to the panel, and filing date. The majority disposition shall be signed by all members of the panel concurring therein, or

certified by one of the members as having been concurred in by such members.

Any separate concurring or dissenting disposition shall be signed by the author or certified by one of the members of the panel as having been prepared by the author thereof.

When two judges of a panel have concurred in a written disposition but the third judge has neither agreed nor circulated a dissent or concurrence within sixty days after notice of the concurrence and circulation of the proposed disposition in its final form, the author shall submit the disposition to the Clerk and send a copy of the covering memorandum to the third member. Seven days after receipt, the Clerk shall file the disposition with a notation that the third judge may file a separate statement at a later date. The author, with the concurrence of the second judge, may grant the request of the third judge to delay filing for a period of fourteen days or for a longer period if the third judge cites extraordinary circumstances or the complexity of the case.

**b. Rule 36 - Notation on Memoranda Dispositions**

All memoranda dispositions shall contain the following notation:

This disposition is not appropriate for publication and may not be cited to or by the Courts of this Circuit except as provided by Ninth Circuit Rule 36-3.



**c.     Electronic Transmission of Dispositions**

The authoring judge shall transmit the disposition electronically to the Opinions Clerk or the Memoranda Clerk, respectively. Memoranda (or order) dispositions will be filed in typewritten format on the next working day following receipt. Separate written confirmation of memoranda dispositions is not necessary.

Unless directed by the merits panel to file an opinion forthwith, the Opinions Clerk will process the opinion on the date of receipt and transmit it electronically to the court's printer for preparation of the printed slip opinion pursuant to the terms of the opinion printing contract. The opinions will be available at 10:00 a.m. on the day of filing in the San Francisco, Pasadena and Seattle clerk's offices. Separate written confirmation of opinions shall be sent to the Clerk's Office the day the opinion is sent for filing.

Upon filing the disposition, the Clerk shall mail one copy, accompanied by a notice of entry of judgment in accordance with Fed. R. App. P. 45(c) to each party. The Clerk shall also mail one copy of the disposition to the trial judge.

**d.     Temporary Hold**

The authoring judge should notify the Opinions Clerk when placing a temporary hold on an opinion.

**e. Costs**

Every disposition in a civil case where there is a mixed judgment, the lower tribunal's judgment is vacated, or where the panel determines that costs shall be unequally divided among the losing parties shall indicate in its text or in a separate order which party or parties shall bear the costs. The Clerk's Office, before filing the disposition, shall determine whether the disposition makes that indication. If the disposition does not indicate which party or parties shall bear the costs, the Clerk's Office immediately shall request that information from the authoring judge, who will enter an appropriate order.

The authoring judge shall also be responsible for motions for reconsideration of the clerk's orders pertaining to cost bills that are entered under Ninth Circuit Rule 39-1.5 and General Order 6.3a. The clerk may refer a motion and proposed order to the authoring judge when the motion presents a novel issue. (*New, 7/1/2002*)

**4.6. Mandate**

**a. Policy Against Issuance of Mandate Forthwith**

Fed. R. App. P. 40 and 41 contemplate that, following a decision by this court, mandate should not issue forthwith, but that time should be allowed after entry of judgment for the filing of a petition for rehearing en banc, or petition for writ of certiorari. It is the policy of this court that only in exceptional circumstances

should a panel order the issuance of mandate forthwith upon the filing of a disposition. (rev. 3-24-04)

**b. Exceptions to Policy Against Issuance of Mandate Forthwith**

Exceptional circumstances may include, but are not limited to, instances where it appears from the record that a petition for rehearing en banc, or petition for writ of certiorari would be legally frivolous, where the losing litigant is attempting to defeat a just result by interposing delaying tactics, or where an emergency situation requires that, to effectuate a just result, the action of the court should become final, and mandate issue, at once. In such a case, the panel may close the disposition with the following language: "No petition for rehearing will be entertained and mandate shall issue forthwith. See Fed. R. App. P. 2." However, such language in the disposition does not prevent a judge from petitioning a rehearing en banc. In a criminal case, the panel may also revoke bail forthwith. (rev. 3-24-04)

**c. Stay of Mandate**

A motion for stay of mandate shall be forwarded to the author of the disposition if a member of the court. If the author is not a member of the court, the motion shall be forwarded to the presiding judge of the panel. The author or presiding judge, as the case may be, shall dispose of the motion. (Rev. 3-26-03)

**d. Recall of Mandate**

A motion for recall of mandate shall be forwarded to the panel. The authoring judge shall be responsible for entering the order disposing of the motion after polling the panel members. If the author is not a member of the court, the presiding judge will issue the order on behalf of the panel. (*New 3-26-03*)

## Chapter V.

### EN BANC PROCEDURES

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#### 5.1. Definitions and General Provisions

a. **Definitions** - For purposes of this chapter:

1. **"Full court"** - means all active judges.

2. **"En banc court"** - means that number of judges, greater than three, established by rule of the court, which shall hear and decide cases taken en banc as provided by statute, rule, or in these General Orders.

3. **"Judge eligible to vote"** - means any active judge who is not recused or disqualified and who entered upon active service before the date of a request for an en banc vote pursuant to GO 5.4.c.1. Notice of recusal or disqualification shall be given to the full court. No senior judge is eligible to vote on whether to take a case en banc. (rev. 1-1-04)

4. **"Judge eligible to serve on the en banc court"** - means any active or senior judge who is not recused or disqualified and who entered upon active service prior to the date the court is drawn. Senior judges shall not serve on an en banc court except: (I) a senior judge who was a member of the three-judge panel that decided the case being reheard en banc may elect to be eligible to be

selected as a member of the en banc court. Any senior judge who elects to be eligible shall notify the Clerk's Office prior to the date the panel is drawn; (ii) a senior judge who takes senior status while serving as a member of an en banc court may continue to serve until all matters pending before that en banc court, including remands from the Supreme Court, are finally disposed of. *(Rev. 7-1-2003)*

5.     **"En banc coordinator"**- means an active or senior judge appointed by the Chief Judge to perform the duties set forth in this chapter.

6.     **"En banc call"** - means a request by a judge or panel that a vote be taken to determine whether a case be heard or reheard by an en banc court.

7.     **"Stop clock"** - means a one-time 14 day extension of the time limits under this chapter, and the time for issuing the mandate.

**b.     General Provisions**

**1.     Judicial Participation**

Each judge selected for the en banc court shall make every reasonable effort to sit on the en banc court, but if unable to sit, the judge shall notify the Clerk as promptly as possible so that the Clerk may be directed to draw a replacement. If a judge becomes available after notifying the Clerk of inability to sit, that judge shall notify the Clerk of his or her availability and shall sit on the en banc court, unless a replacement judge has already been drawn, in which case the replacement judge

shall sit on the en banc court. In such event, the originally-selected judge shall be placed back in the pool of available judges. *(Rev. 7/1/2002)*

All members of the court, senior and active, and visiting judges who participated in the panel decision, shall be kept informed of en banc proceedings, including all en banc calls, responsive memoranda, and votes, until a case is taken en banc or returned to the panel. After a case has been taken en banc, only those judges participating in the en banc court shall be included in the distribution of memoranda, proposed opinions, and other communications regarding en banc proceedings.

## **2. Duties of the En Banc Coordinator**

The en banc coordinator shall supervise the en banc process, including time schedules provided in this chapter; shall circulate periodic reports on the status of each case under en banc consideration; may, for good cause, extend, suspend, or compress the time schedules provided in this Chapter; may designate another judge to perform all or part of the en banc coordinator's duties during the coordinator's absence; may suggest, for any particular case, a modification or suspension of the provisions of this chapter; and may for good cause suspend en banc proceedings.

*(Rev. 7/1/2002)*

## **3. Vote Tallies**

The en banc coordinator will record the en banc votes and circulate the final tally to the court. Orders rejecting or accepting cases for en banc consideration

shall not specify the vote tally. Any judge eligible to vote may direct that his or her dissent from a failure to accept a case for en banc consideration be incorporated in the order.

#### **4. Duties of Panel Members**

The following persons shall be responsible for the distribution of the panel recommendation pursuant to GO 5.4.b and for orders denying a petition for rehearing en banc if no timely en banc call is made or if an en banc call fails to receive a majority vote:

- (a) The author of a majority disposition, when an active or senior judge of this court, or
- (b) The presiding judge of the panel, when the author is a visiting judge, or when the case has not yet been submitted.

#### **5. Extensions of Time**

Until a case is taken en banc or returned to the panel, any request by a judge for an extension of time shall be made in writing or by electronic mail to the en banc coordinator with copies to all judges prior to the expiration of the relevant time period.



## **6. Notification to En Banc Coordinator**

Judges should direct copies of all en banc correspondence under this Chapter to the en banc coordinator and the Clerk of Court or any person the Clerk may designate until a final en banc vote is tallied.

## **7. Death Penalty Cases**

En banc procedures in death penalty cases, when a date for execution has been set, are contained in Circuit Rule 22 and shall be supervised by the Capital Case Coordinator.

### **5.2. Initial Hearing En Banc**

#### **a. Petition by a Party Prior to Calendaring**

The Clerk shall (1) enter the receipt or filing of a petition for an initial hearing en banc, (2) send copies to the en banc coordinator and the appropriate motions attorney, (3) notify the parties that the case will be heard in due course by a panel unless the court votes to hear it en banc, and (4) send copies of the briefs to the motions attorney upon the completion of briefing.

As soon as possible after the completion of briefing, the motions attorney shall prepare for the en banc coordinator a memorandum setting forth the facts and issues of the case. The en banc coordinator shall promptly notify all judges that a party has petitioned for an initial hearing en banc, but that the case will be calendared before a three-judge panel unless a judge makes an en banc call. The en banc

coordinator shall distribute the motions attorney's memorandum and may also distribute an independent evaluation of the matter. Any judge may call for en banc within 14 days after receipt of notice from the en banc coordinator.

The en banc coordinator shall notify the Clerk and motions attorney of the rejection of the petition when either (1) no judge calls for a vote on the petition, or (2) upon a vote, there is no majority in favor of en banc consideration. Upon notification, the Clerk shall enter on the docket a notation that the petition has been rejected.

**b. Call for En Banc by Panel**

The panel before which a case is calendared may call for a vote that a case be heard en banc. If the call is made before the panel hears the case, the panel shall instruct the Clerk to remove the case from the calendar. The panel shall circulate its call to all members of the court with a memorandum setting forth the reasons for a hearing en banc. The provisions of GO 5.4.c and 5.5 governing supplemental briefing by the parties, exchange of memos, and voting shall then apply. If the case fails to receive a majority of votes to be heard en banc it shall be returned to the three-judge panel.

### **5.3. Amendment of Disposition; Proposal by Judge**

#### **a. Amendment of Disposition**

If a panel amends its disposition, the panel shall set forth in its amended disposition or separate order: (1) the ruling on the petition for rehearing or petition for rehearing en banc; (2) whether subsequent petitions for rehearing or rehearing en banc may be filed; and (3) the status of any pending petitions for rehearing or rehearing en banc not ruled on. The Clerk's office shall contact the authoring judge if the amended disposition does not so specify. *(New 7/1/2002)*

If a panel substantively amends its disposition, any off-panel judge may, within seven (7) days of the filing of the amended disposition, notify the panel and the other members of the court that he or she is considering making an en banc call on the basis of the substantive amendment. The judge who makes such notification shall in writing or by electronic mail direct the Clerk of Court or any person the Clerk may designate to stay the mandate. Such notification shall extend the time to make an en banc call by fourteen (14) days. Thereafter, the provisions of this chapter relating to a *sua sponte* en banc calls shall apply. *(New 12-1-2002)*

#### **b. Proposal by Judge**

Any active or senior judge may, before an en banc call is made or before the time for calling for en banc expires, propose to the panel that it amend its

disposition. Such a request does not suspend en banc procedures. Any proposal to amend shall be accompanied by the text of the proposed amendment.

#### **5.4. Rehearing En Banc**

##### **a. Duties of Clerk**

Upon the filing by a party of a petition for rehearing en banc, the Clerk shall circulate a copy to each active judge and to those senior judges who have requested copies.

##### **b. Request for Notice of Panel Vote on Petition for Panel Rehearing and Time Within Which Judges Must Act After Notice**

###### **1. Request for Notice**

An off-panel judge may request notice of the panel's vote on a petition for panel rehearing and petition for rehearing en banc within 21 days of the circulation of the petition for rehearing en banc. In the absence of a timely request for notice, the panel may enter an order denying the petition for rehearing en banc and denying the petition for panel rehearing.

###### **2. Circulation of Notice; Vote on Petitions; Proposed Amendments**

If a judge timely requests notice pursuant to G. O. 5.4.b.1, the panel shall circulate to all judges notice of its vote on the petitions for panel rehearing and rehearing en banc. If the panel decides to amend its opinion the panel shall notify all judges of its proposed amendments.

A judge must call for an en banc vote within: (1) 14 days of the date of the panel's distribution of the GO 5.4b notice; (2) 21 days after the circulation of the last-filed petition for rehearing en banc; or (3) if a response to the petition for rehearing en banc has been requested, within 14 days after the circulation of the response, whichever is latest. (*Rev. 7/1/2002*)

**3. Procedure When Only a Petition for Panel Rehearing is Filed**

In a case where a party files only a petition for panel rehearing and no petition for rehearing en banc, an off-panel judge may call for en banc within the time limits set forth for *sua sponte* calls in G. O. 5.4.c.3. Any such call shall act as a request for notice of the panel's vote on the petition for rehearing. Alternatively, an off-panel judge may expressly request notice of the panel's vote on the petition for rehearing, but such a request must also be made within the time limits for *sua sponte* calls set forth in G. O. 5.4.c.3. The time to call for en banc shall expire 14 days after such notice.

**c. En Banc Calls and Supplemental Briefing**

**1. En Banc Calls**

Any judge may call for a vote to rehear a case en banc: (1) in response to notice of the panel's vote that a petition for rehearing en banc be denied and a petition for panel rehearing denied (see GO 5.4.b), or (2) *sua sponte*. The requesting judge shall notify the panel and all other members of the court of any call, and shall

forward a memorandum setting forth reasons: (1) within 14 days of the date of distribution of the call; (2) within 14 days after the circulation of the response to the petition for rehearing en banc; or (3) in the case of *sua sponte* calls, within 7 days after the circulation of the simultaneous briefing, whichever is latest. (Rev. 7/1/2002)

## **2. Supplemental Briefing**

When an en banc call is made in a case in which a party has petitioned for en banc consideration and in which no response to the petition has been previously filed, the author of the panel opinion or the Clerk of Court upon request of the en banc coordinator, shall ordinarily enter an order directing counsel to file within 21 days of the date of the order a response to the petition for rehearing en banc. The time provided by GO 5.5.a in which judges shall circulate memoranda will not start to run until the response is filed or the en banc coordinator determines that no response will be filed.

## **3. Sua Sponte Calls**

A judge may *sua sponte* call for a vote on rehearing en banc within seven days of the expiration of the time for filing a petition for panel rehearing. This means the *sua sponte* call must be made within 21 days of the filing of the panel's decision in all cases, except civil cases in which the United States is a party. In such cases, the call must be made within 52 days of the filing of the panel's decision. See F.R.A.P. 40(a). A judge may also call for en banc within 21 days of the filing of an

order directing that a previously unpublished disposition be published. Upon receipt of a timely *sua sponte* en banc call, the author of the panel opinion or the Clerk of Court upon the request of the En Banc Coordinator shall ordinarily enter an order directing the parties to file simultaneous briefs within 21 days setting forth their respective positions on whether the matter should be reheard en banc. If the En Banc Coordinator orders that no supplemental briefing will be filed, the parties will be notified of the *sua sponte* en banc call. The date the simultaneous briefs are circulated by the Clerk's Office or the date En Banc Coordinator determines that no supplemental briefs will be filed will start the time for circulation of memos set forth in GO 5.5.a. (Rev. 7/1/02)

#### **4. Withdrawal of En Banc Calls**

A judge may withdraw an en banc call by notifying the en banc coordinator in writing with copies to all judges. The time periods set forth in this chapter shall be suspended for a period of seven (7) days following circulation of the notice to enable another judge to pursue en banc consideration. (New, 7/1/2002).

#### **d. Staying the Mandate**

If a stop clock or a *sua sponte* call is made, in a case where no petition for rehearing en banc or petition for panel rehearing has been filed, the judge who makes the call shall in writing or by electronic mail direct the Clerk of Court or any person the Clerk may designate to stay the mandate and notify the panel. If a judge

makes a call or stops the clock before the time for filing a petition for panel rehearing has expired, it is the responsibility of that judge to notify the Clerk of Court or any person(s) he or she may designate to stay the mandate in the event no petition for panel rehearing is filed. Otherwise the mandate will issue pursuant to F.R.A.P. 41(a) and en banc procedures will terminate. It is also that judge's responsibility to notify the Clerk's Office if the stop clock or en banc call is withdrawn.

**e.     "Stopping the Clock"**

A judge, without calling for an en banc vote, may extend the time in which to make an en banc call for 14 days. Only one such delay is permitted. In cases where no petition for rehearing has been filed by a party, the judge stopping the clock shall notify the Clerk's office to stay the mandate. When a judge stops the clock pending review of a petition for rehearing, and the panel grants a party an extension of time to file a petition for rehearing beyond the 14-day stop clock period, the "stop clock" period will extend for 14 days after the petition is due. *(Rev. 7/1/2002)*

<b>5.5.    Procedure After Supplemental Briefing</b>
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**a.     Memoranda**

Any judge may circulate memoranda in response to an en banc call within 21 days after the conclusion of all supplemental briefing by parties pursuant to G.O. 5.4.c.2 and .3.



**b. Voting**

When the exchange of memoranda has been completed, the en banc coordinator shall notify all active judges to vote. No judge shall circulate further correspondence on the case after that notice. A judge's failure to vote shall be considered a "no" vote. Unless otherwise ordered, each judge shall cast a vote within 14 days of the notice to vote. A judge may change his or her vote if accomplished prior to the expiration of the voting period. Upon the expiration of the voting period, the en banc coordinator shall notify the judges of the result and the vote tally.

**c. No Majority Favoring En Banc Consideration**

If the call fails to obtain a majority, the panel shall resume control of the case and no further en banc action is required.

**d. Majority Favoring En Banc Consideration**

If a majority of the judges eligible to vote on the en banc call votes in favor of en banc consideration, the Chief Judge shall enter an order taking the case en banc pursuant to Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to this court or any district court of the Ninth Circuit, except to the extent adopted by the en banc court. *(Rev. 1-27-04)*

## **5.6. Reserved Time**

En banc oral arguments and conferences shall normally be scheduled on a quarterly basis in conjunction with court meetings. A location for each en banc argument will be determined by the Chief Judge in consultation with the Court Executive Committee. Judges are expected to appear in person for en banc hearings. In the event no oral argument is to be heard, the Chief Judge shall designate a date, time, and place for a conference of the en banc court, which ordinarily shall also be the date of submission of the case.

## **5.7. Assignment of Opinion Writing, Circulation, and Filing of Disposition**

### **a. Assignment of Opinion Writing**

After the case has been submitted to the en banc court, the judge senior in service among those voting with the majority shall assign the writing of the majority opinion. In the event more than one judge expresses a minority view, the senior judge among those sharing that view may assign the writing of a dissenting opinion without restricting any judge in the expression of individual views. A judge should not be selected to write a majority or dissenting opinion unless the judge's workload will permit the judge to circulate the opinion within this 45 days.

**b.     Circulation of Opinions**

**1.     Majority Opinion**

Any judge unable to circulate the first draft of the majority opinion within 45 days shall circulate a memorandum to the members of the en banc court stating why the deadline cannot be met. The memorandum should state when the draft opinion will be circulated.

**2.     Dissenting or Other Separate Opinion**

A judge who plans to circulate a dissenting or other separate opinion shall notify the members of the en banc court as soon as possible, but in any event within 14 days after the date of distribution of the draft of the majority opinion. Any dissenting or separate opinion shall be circulated within 45 days after a proposed majority opinion is distributed.

**3.     Voting on Opinions**

Voting shall conclude within the time established by the Chief Judge or the presiding judge.

**c.     Filing of Dispositions**

The author of the majority opinion shall be responsible for coordinating the proposed majority, dissenting, and concurring dispositions, and filing the final dispositions at the appropriate time.

## **5.8. Rehearing by Full Court**

### **a. Petition by a Party**

Upon a timely petition by a party for a rehearing en banc before the full court filed within 14 days after the filing of an en banc disposition, the Clerk shall forward a copy thereof to all active judges and any senior judge on the en banc court. Thereafter, the provisions of this chapter relating to petitions for rehearing en banc on three-judge panel cases shall apply.

### **b. Sua Sponte Calls**

If no petition for rehearing en banc before the full court is filed, any judge may, within seven days after the date such petition was due, request a vote on whether the case should be reheard by the full court. This request shall be accompanied by a memorandum in support of full court consideration. Thereafter, the provisions of this chapter relating to petitions for rehearing en banc of three-judge panel cases shall apply.

## **5.9. Stay of Mandate**

A motion for stay of mandate in a case decided en banc shall be forwarded to the author of the disposition, who shall dispose of the motion and then send all members of the en banc court a copy of the motion and the disposition of the motion. (Rev. 3-26-03)

#### **5.10. Recall of Mandate**

A motion for recall of mandate in a case decided en banc shall be forwarded to the members of the en banc court. The authoring judge shall be responsible for entering the order disposing of the motion after polling the members of the en banc court. (*New 3-26-03*)

## Chapter VI.

### MOTIONS & SCREENING CASES

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#### 6.1. Definitions

For purposes of these General Orders:

(a) "**Motion**" - means an application to the court, or a member thereof, for procedural, summary, or discretionary relief. It includes, without limitation, a petition for writ of mandamus or prohibition; a petition for permission to take an interlocutory appeal; an application for stay or application for injunction; an original petition for writ of habeas corpus; an appeal from the grant or denial of bail or change of conditions of bail pending trial; a motion for bail pending appeal; an application for a certificate of appealability; an application for summary affirmance or application for summary reversal; an application for leave to proceed on appeal in forma pauperis or for appointment of counsel; an application for extension of time to take any action required or permitted by law; certain fee vouchers; and court initiated proceedings, such as disciplinary and dismissal matters.

(b) "**Criminal motion**" - means a motion in or arising from a criminal action, a federal or state habeas corpus proceeding, or certain claims (vouchers) pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A.

(c) "**Civil motion**" - means a motion of a type ordinarily considered as part of or ancillary to, a civil action, other than a criminal motion.

(d) "**Motions attorney**" - means any staff attorney assigned to the processing of criminal and civil motions for disposition by the court.

(e) "**Certified motions attorney**" - means any motions attorney who also has been certified as a deputy clerk.

(f) "**Procedural motion**" - means a motion that may be disposed of by the Clerk or by a designated deputy clerk, a certified motions attorney or circuit mediator, as specified in detail in Appendix A to these General Orders.

(g) "**Designated deputy clerk**" - means any deputy clerk assigned to the processing of procedural motions.

(h) "**Emergency motion**" - means a motion requesting action in 21 days or less, or any other motion which in the court's judgment requires immediate consideration.

(I) "**Oral screening calendar**" - means a calendar consisting of cases deemed suitable for submission without oral argument that are presented orally to a three-judge screening panel.

(j) **"Written screening calendar"** - means a calendar consisting of cases deemed suitable for submission without oral argument that are submitted to a three-judge screening panel. *(Rev. 7-1-2003)*

(k) **"COA Calendar"**

A certificate of Appealability (COA) calendar means a calendar consisting of requests for certificates of appealability, second or successive petitions, and any motions for reconsideration of orders entered by previous COA panels *(New 7-1-2003)*

**6.2. Assignment of Judges**

(a) **Motions and Oral Screening Calendars**

The court shall appoint, for each month, a panel composed of three members of the court to serve on the motions and oral screening calendars. The motions panel members shall rotate as the "lead judge," the "second judge," and the "third judge." Insofar as practicable, assignments shall be made in rotation. Each active judge, except the Chief Judge, shall so serve. The Chief Judge and any senior judge may notify the Clerk that they wish to serve on such panels. Visiting judges shall not serve on motions or oral screening panels.

(b) **Certificate of Appealability Calendars**

The Court shall appoint two judges to serve as the certificate of appealability ("COA") panel. The panel will meet for one day. A new panel will be appointed each week, depending on judges' availability. All active judges are expected to



serve on two panels per year. Senior judges may notify the Clerk that they are willing to serve on such panels. Visiting judges shall not be appointed to serve on a COA calendar. *(New 7-1-2003)*

**(c) Written Screening Calendars**

The court shall also appoint three-judge panels to serve on written screening calendars. The panel may consist entirely of senior judges. Such panels are selected at random by the Clerk's Office at the close of the calendar year, and shall serve together for the succeeding year. Any senior judge may notify the Clerk that he/she wishes to serve on the written screening calendar.

**(d) Scheduling of Motions and Oral Screening Calendars/  
Procedure Governing Motions Panel Matters**

The monthly motions and oral screening panel ("OSP") shall be presumptively scheduled during the same week as the San Francisco oral argument calendars. The OSP shall sit for five days. Judges may opt to serve on the OSP during the same month as an oral argument calendar. The panel may readjust the dates of its session. At the beginning of the calendar year, the Clerk shall establish presumptive dates for sessions of the motions and oral screening panels in conjunction with their prospective assignments to oral argument calendars. Any prospective appointee unable to serve during the entire month assigned shall arrange for a substitute and then notify the Clerk. Insofar as practicable, assignments shall be made in rotation.

*(Rev., 7-1-2003)*

Each panel may adjust the structure and dates of its sessions, provided that the panel ensures that: (1) it meets in San Francisco for a length of time sufficient to dispose of those motions and screening cases ready for presentation that month; and, (2) the length of time between panels allows the staff attorneys a sufficient period of time to prepare an adequate calendar; and (3) members of the panel serve for the entire month of their assignment. Exchange of a portion of the panel assignment shall be permitted only under exceptional circumstances.

The senior judge of each panel should notify the Clerk of any changes in the scheduling of the sessions no later than the second week of the month preceding the scheduled panel assignment.

The motions attorneys and designated deputy clerks shall prepare motions not appropriate for consideration by the Clerk, the appellate commissioner, or a single judge for presentation to a motions panel during the periodically scheduled sessions. Motions shall be presented orally to the motions panel. For some motions, the moving papers will be sent to the panel in advance of presentation. In complex matters, legal memoranda will be prepared in advance of presentation, either at the direction of the lead judge or when otherwise appropriate.

In general, each panel shall decide the motions presented to it, but a panel may decide to continue a matter for decision by a subsequent panel.

If a dispositive motion is filed in a comeback case, the motions attorney shall contact the lead judge of the previous panel to ascertain whether the panel wishes to consider the motion.

The procedure governing screening cases is set forth at G.O. 6.5.c.

### **6.3. Delegation of Authority to Dispose of Motions**

The Clerk shall enter the receipt or filing of a motion and transmit it as described below.

#### **a. Dispositions of Motions by the Clerk**

The Clerk may dispose of motions described in and subject to the conditions set forth in Fed. R. App. P. 11(b) and 42(b) and Cir. R. 39-1.5 and 27-7. The Clerk also may dispose of motions enumerated in Appendix A or may in his or her discretion refer any of those motions to a single judge, appellate commissioner, circuit mediator, appropriate motions attorney, or a merits panel.

Upon motion or *sua sponte*, the Clerk may grant one (1) initial extension of time of no more than seven (7) calendar days for the filing of a petition for rehearing or petition for rehearing en banc in cases in which the petition must be filed within fourteen (14) days from entry of judgment. The Clerk will enter an appropriate order and notify the panel judges and the parties accordingly. (Rev. 12-1-02) (rev. 3-24-04)

Upon motion, the Clerk may grant one (1) initial extension of time of no more than thirty (30) days for the filing of a petition for rehearing or petition for rehearing

en banc in any criminal case. For purposes of this section, appeals from petitions under 28 U.S.C. §§2241 and 2254 and motions under 28 U.S.C. § 2255 are deemed civil cases. The Clerk will enter an appropriate order and notify the panel judges and the parties accordingly. (rev. 3-24-04)

The Clerk may additionally enter orders that deny late requests for costs as untimely and respond to motions for late filing. Such orders are subject to reconsideration by the authoring judge; any motion for reconsideration is due 14 days from the date of the clerk's order. Prisoners not represented by an attorney shall have 28 days from the date of the clerk's order to move for reconsideration. *(New, 7/1/2002)*

**b.     Dispositions of Motions in Cases Assigned to Oral Argument Panels**

Except as noted above, all motions in cases that have been calendared for hearing by, or are under submission to, or have otherwise previously been assigned to a panel shall be submitted to that panel.

**c.     Dispositions of Motions in Cases Assigned to Screening Panels**

All motions filed after the staff attorney have identified a case to be placed on the screening calendar shall be directed to the Office of Staff Attorneys. The attorney assigned to the case shall refer the motion to the screening panel, single judge, appellate commissioner or a motions attorney, as appropriate, for processing.

**d.     Dispositions of Procedural Motions Filed During  
the Pendency of a Substantive Motion**

If a motion within the authority of the Clerk, the appellate commissioner or a single judge is filed during the pendency of a motion which must initially be presented to a two or three judge panel, the motion shall be presented simultaneously to the two or three judge panel for disposition.

**e.     Disposition of Motions by Appellate Commissioner**

The Court authorizes the Chief Judge to delegate to an appellate commissioner authority to issue for the court non-dispositive orders in all appeals and petitions except those that would reverse a decision or order by a district judge or where the following relief is requested:

- (1)    a stay of a district court judgment,
- (2)    injunctive relief,
- (3)    bail,
- (4)    transcripts pursuant to 28 U.S.C. § 753(f),
- (5)    certification of a state law question,
- (6)    a certificate of appealability to appeal,
- (7)    leave to proceed in forma pauperis where a district court has denied such leave,
- (8)    reconsideration of an order issued by one or more judges.

Requests for the types of relief listed above shall be presented to a motions panel. If the appellate commissioner is inclined to recommend that dispositive action be taken, or that leave to proceed in forma pauperis be denied, or that a motion for appointment of counsel be denied, or that sanctions be granted, the matter shall be presented to a regularly scheduled motions panel. The appellate commissioner has the discretion to refer any motion to a regularly scheduled motions panel, merits panel, or a single judge in the first instance, regardless of the type of relief requested. In addition, the appellate commissioner shall have authority to decide motions for voluntary dismissal and stipulated remand.

The Court also authorizes the Chief Judge to delegate to an appellate commissioner motions to proceed pro se by defendants in criminal appeals. Such motions shall be referred immediately by the Clerk to the appellate commissioner, who shall be authorized to hold a hearing pursuant to Faretta v. California, 422 U.S. 806 (1975), to confirm that appellant's request is knowing, intelligent, and unequivocal. The appellate commissioner shall engage in a colloquy with appellant regarding the dangers and disadvantages of self-representation on appeal. The commissioner shall be authorized to consider such evidence as the commissioner deems necessary and to make findings of fact.

Should appellant decide to withdraw the request to proceed pro se, the commissioner shall be authorized to enter the appropriate order and no further action

will be taken by the court. Should the commissioner determine that appellant intends to continue with his or her request to proceed on appeal pro se, the commissioner shall submit a recommendation concerning appellant's motion to a motions panel for further action.

**f.     Disposition of Single Judge Motions**

A single judge shall have the authority set forth by statute and, *inter alia*, Fed. R. App. P. 22 and 27(c) to grant or deny motions, except as otherwise limited by the Circuit Rules or these orders. That these orders allow for the referral of such matters to an appellate commissioner is not a limitation on the authority of a single judge, and a single judge may perform any function delegated to an appellate commissioner.

A single judge shall have the authority to refer any motion to a merits panel, a motions panel, or an appellate commissioner.

**g.     Disposition of Two and Three Judge Motions**

(1) The following motions may be presented to two judges rather than the full panel if only two are participating. Any motions judge participating may vote to grant relief and so order. If all judges present agree that relief will not be granted, they shall so order:

- I. request for certificate of appealability;
- ii. for leave to proceed in forma pauperis in civil cases;

- iii. for temporary injunctive relief pending further consideration by the panel; and
- iv. for transcripts at government expense.

(2) The following motions may be presented to no fewer than two judges rather than the full panel if only two are present. However, two judges must agree in order to either grant or deny the requested relief:

- I. for injunctive relief pending appeal;
- ii. petition for permission to appeal pursuant to 28 U.S.C. § 1292(b); and
- iii. for reconsideration of an appellate commissioner, chief circuit mediator, or single judge order.

Therefore, the third judge must be present for consideration of the above motions if:

- I. one of the other panel members is disqualified or is otherwise unavailable;
- ii. the other panel members disagree about the disposition of the motion; or
- iii. he or she is requested by the other panel members to participate.

(3) Three judges shall participate:

- I. whenever a motion results in the disposition of the case; or
- ii. the panel chooses to publish its order.

(4) If two judges determine that oral argument on a motion is necessary, the panel shall direct the motions attorney to make the necessary arrangements. If one of the judges is recused from consideration of the motion and a three-judge



order is desirable, a judge or the motions attorney shall contact the Clerk and have a third judge drawn by lot from the available active judges.

(5) If one judge is recused or unavailable to consider a motion requiring the attention of three judges, the motions attorney shall contact the Clerk who shall draw a third judge by lot from the available judges.

#### **6.4. Emergency Motions**

##### **(a) General Procedure**

The Clerk shall enter the receipt or filing of an emergency motion and immediately deliver it to the appropriate merits panel or motions attorney for processing.

For all emergency motions other than in state death penalty cases, the motions attorney, after confirming the nature of the emergency with counsel for the parties when appropriate, shall immediately bring the emergency motion to the attention of the lead judge of the motions panel. The lead judge, in his or her discretion, may convene the panel. If the lead judge is unavailable, the motions attorney shall immediately bring the motion to the attention of the second judge, and if that judge is unavailable, then to the third judge. Should judges who are not serving on the motions panel be needed to consider an emergency motion, the Clerk shall be directed to select them by lot.

**(b) Emergency Motions Requiring Same Day or Next Day Action**

Pursuant to Ninth Circuit Rule 27-3, the moving parties shall contact the Clerk's Office in San Francisco prior to filing a motion requesting emergency relief. Upon such notification, the Clerk shall refer the parties to the appropriate motions unit and the motions attorney will facilitate the filing of such a motion and any responses. Pursuant to General Order Section 6.3.a.3, all motions filed in cases assigned to merits panels shall be referred to that panel.

Upon the receipt of a motion requesting emergency relief before the next scheduled motions panel, the motions attorney shall immediately bring the motion to the attention of the appropriate motions panel and ask for instructions. The motions attorney shall contact members of the motions panel in accordance with section 6.4.a. If no member of the motions panel is available, the motions attorney shall contact the Clerk who shall select judges by lot from among the available judges.

In the event an emergency motion is first filed in a Clerk's Office other than in San Francisco, the Clerk or deputy clerk shall immediately bring the matter to the attention of the merits panel if appropriate, or, in all other cases, the appropriate motions unit. Upon notification of such a filing, the motions attorney shall coordinate the filing and distribution of the motions papers with the Clerk and shall immediately notify the motions panel of the emergency pursuant to section 6.4.a and ask for instructions.

Any judge contacted by the Clerk or a motions attorney regarding an emergency motion requesting relief within a 48-hour period may construe the motion as a request for temporary relief pending further consideration by the motions panel and grant or deny such relief. However, if the grant or denial of such temporary relief would effectively dispose of the motion or the appeal, the judge shall obtain the concurrence of at least one other judge. The second judge should be a member of the motions panel or, if unavailable, a judge selected at random by the Clerk.

Temporary relief should not be granted where relief is not needed before the next regularly scheduled meeting of the motions panel or where the record indicates the moving party has been unreasonably dilatory in seeking relief.

No more than two judges are required to participate in a telephone conference dealing with an emergency motion unless the decision involves the disposition of the case.

In the event a single judge is drawn at random to dispose of an emergency motion, and that judge decides to convene a panel and no members of the motions panel are available, the Clerk shall draw the needed panel members by lot. After such a panel has disposed of the emergency, the panel shall be dissolved unless directed by the Chief Judge to retain the matter.

Pursuant to the above guidelines, emergency motions are, wherever possible, to be directed to the motions attorneys who will promptly present the matter to a

judge on the motions panel or if unavailable, to a judge drawn at random by the Clerk. However, a situation may arise where time or circumstances may find a judge not serving on the motions panel being directly presented with an emergency motion requesting same or next day relief. In such a situation, that judge should first attempt to contact the lead judge of the motions panel before acting on the motion. If the lead judge is not available or is unable to act, and the judge presented with the motion determines that an emergency situation in fact exists, the motion may be construed as one for temporary relief pending consideration by the full motions panel and disposed of by the single judge, who shall promptly inform the motions panel and/or the motions unit of the action taken.

Pursuant to the Advisory Note to Circuit Rule 27-3, the Court maintains a 24-hour emergency telephone line which shall be monitored by the motions attorneys. When informed of an emergency situation by way of a telephone message, the motions attorneys shall follow the procedures described above and immediately contact the designated motions panel or, if unavailable, a judge selected at random by the Clerk and proceed pursuant to his or her instructions.

**(c) Motions for Stay of Deportation or Removal in Petitions for Review**

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**1. Temporary Stay**

Upon the filing of a motion or request for stay of removal or deportation, the order of removal or deportation is temporarily stayed until further order of the court.

A briefing schedule will not be set until the motion for stay is resolved. Any existing briefing schedule will be deemed vacated upon the filing of such a motion.

## **2. Supplemental Motion**

If the court determines that the motion or request for stay fails to discuss the merits of the petition for review and to identify the potential hardships faced by the petitioner due to deportation or removal during the pendency of the petition, an order will inform the petitioner of that determination and provide petitioner with the opportunity to file a supplemental motion for stay within 14 days from the filing of the order.

## **3. Response**

The respondent shall file its response to the request or motion within 42 days from filing of the original request or motion. The administrative record is due with the response. If the administrative record is not filed by the time the response is due, the respondent shall, at a minimum, include with its response a copy of the Board of Immigration Appeals' order if such order has not been provided by petitioner and the Immigration Judge's order if such order provides the primary basis for the Board's decision. Any dispositive motions respondent seeks to file are due at the same time the response is due.

#### **4. Reply**

The petitioner may file a reply to the response within 7 days from service of the response.

#### **5. Orders to Show Cause**

If the court determines that it may lack jurisdiction over the petition for review, an order will be issued directing the petitioner to show cause why the petition should not be dismissed for lack of jurisdiction. The time limits set forth in this rule will not apply and the order will establish the applicable time limits for responding to the order. The temporary stay will continue in effect pending resolution of the jurisdictional issue or until further order of the court.

#### **6. Non-Opposition**

If respondent files a motion of non-opposition to the stay motion in lieu of the response provided for in subsection (c) above, the temporary stay shall continue in effect during the pendency of the petition for review or until further order of the court. If the respondent files a notice of non-opposition, the administrative record will not be due in accordance with subsection (c), and a new briefing schedule and due date for the administrative record will be established upon receipt of the notice of non-opposition.

## **7. Other Petitions for Review**

If a petition for review is filed without a request for a stay of deportation or removal, a briefing schedule shall be established upon the filing of the petition. The administrative record will be due 90 days from the filing of the petition rather than 40 days as provided in Fed. R. App. P. 15.

## **8. Extensions of Time to Respond to a Stay Motion**

The Clerk is authorized to grant a single oral request for an extension of up to sixty (60) days to respond to a stay motion. If the agency obtains such an extension, no further extensions will be granted. The agency's failure to respond by the due date will be construed as a statement of non-opposition to any pending stay request.

*(New 1-1-2003)*

**Note:** *Pursuant to this court's decision in DeLeon v. INS, 115 F.3d 643 (9th Cir. 1997), a final order of deportation or removal is automatically temporarily stayed upon the filing of a motion or request for stay of deportation or removal in a petition for review of such an order. This temporary stay is in effect whether or not the court issues an order confirming such stay. See, id. The court will not ordinarily issue such an order confirming the stay, although it may issue an order to show cause relating to jurisdictional questions or issues pertaining to the sufficiency of the stay request and/or the payment of fees. With regard to further briefing on the merits of the stay, petitioner may file a supplemental motion within 14 days. See, Abbassi v. INS, 143 F.3d 513 (9th Cir. 1998).*

## **6.5. Screening Calendars**

### **(a) Selection and Criteria of Cases for Screening Calendars**

Cases are assigned to the screening calendars based on the numerical weight given to the case by the Clerk's Office. Screening cases must be eligible for

submission without oral argument under FRAP 34(a). Additionally, they should meet all of the following criteria:

- (1) The result is clear.
- (2) The applicable law is established in the Ninth Circuit based on circuit or Supreme Court precedent.

After the Clerk assigns a case to the screening calendar, the Clerk's Office forwards the case materials to the staff attorneys. The staff attorneys then place each screening case on either an oral screening calendar or a written screening calendar. *(Rev. 7/1/2002, 7-1-2003)*

**(b) Oral Screening Panel Presentations**

**(I) Disposition of Cases**

The staff attorneys shall prepare proposed memorandum dispositions for the cases that they place on the oral screening calendars. An authoring judge will be designated for each case presented to the oral screening panel, and the writing assignment will rotate among the three panel members.

The staff attorneys shall orally present the proposed dispositions to the screening panels at periodically scheduled sessions. After the staff attorneys have presented each case, the panel members discuss the proposed disposition and make any necessary revisions. If the three panel members unanimously agree with the



disposition, the designated authoring judge shall direct the presenting attorney to certify the proposed disposition for filing pursuant to G.O. 6.9. *(Rev. 1/1/2000)*

Disposition of cases presented at the oral screening and motions panel ordinarily will be by unpublished memorandum or order. If, in the judgment of the panel, a decision warrants publication, then the matter shall be forwarded to the next available merits panel unless: (1) it involves exigent circumstances arising from an emergency motion; or (2) is a highly time-limited proceeding that cannot appropriately be resolved using normal procedures. If the panel decides to publish in one of these unusual circumstances, the proposed opinion shall be included in the pre-publication report with a notation that it arose from a screening and motions panel.

*(Rev. 7/1/2002)*

**(ii) Rejection of Cases**

All three judges must agree that the case is suitable for the screening program before a case is disposed of by an oral screening panel. Any one judge may reject a case from the oral screening calendar. Judges normally shall reject any case that does not meet the screening criteria, as outlined above in 6.5.a.

If a case is rejected from the oral screening calendar, it shall be scheduled on the next available argument calendar. The proposed disposition and the rejecting judge's reasons for rejecting the case shall be sent to the Calendar Unit for forwarding to the oral argument panel assigned to the case.

**(iii) Petitions for Rehearing**

The Clerk shall enter the receipt or filing of each petition for rehearing in any case disposed of by an oral screening panel, and shall forward it to the appropriate staff attorney. The staff attorney who presented the case to the oral screening panel shall forward to the panel (1) a copy of the petition for rehearing, and (2) a memorandum discussing the issues raised in the petition for rehearing. The staff attorney also shall notify the appropriate docketing unit, in writing, of the date on which he or she forwards the petition for rehearing to the panel. If a petition for rehearing en banc is filed in any case disposed of at an oral screening panel, the relevant procedures set forth in Chapter V shall apply. (rev. 3-24-04)

**(c) Written Screening Panels**

When a written screening panel indicates that it is ready for case assignments, staff shall send the requested number of cases taken from the cases designated as those eligible for screening pursuant to G.O. 6.5(a). The panel will advise the clerk's office as to which member of the panel will have the writing assignment. The designated authoring judge will prepare and circulate in each case an optional bench memorandum and a proposed disposition for comment and approval. The authoring judge is responsible for forwarding the written disposition to the clerk's office for filing. (Rev. 7-1-2003).

The Calendar Unit shall transmit the materials on a rotating basis to the panels that have been appointed to serve on the written screening calendar. The writing assignment is also rotated among the three panel members.

**(1) Rejection by Judges**

Any one judge may reject a case from the written screening calendar. Judges shall reject any case that does not meet the screening criteria, as outlined above in 6.5.a. If a case is rejected, a replacement case will be sent by staff. If a case is rejected from the written screening calendar, it shall be scheduled on the next available argument calendar. The draft disposition, and the rejecting judge's reasons for rejecting the case, along with any bench memorandum, shall be sent to the Calendar Unit for forwarding to the oral argument panel assigned to the case. *(Rev. 7-1-2003)*

**(2) Dispositions**

Dispositions ordinarily will be by memorandum. If the panel has not issued a separate order submitting the case, a footnote should be included in the disposition indicating that the panel unanimously agrees that the case should be submitted on the briefs pursuant to FRAP 34(a). *(Rev. 7/1/2002, 7-1-2003)*

**(d) Written Screening Calendars**

[Abrogated 3-24-04]

## **6.6. Recalcitrant Witness Appeals**

Upon receipt of a notice of appeal in which review is sought under 28 U.S.C. § 1826, the Clerk shall docket the appeal and immediately deliver the notice of appeal to the motions unit. A motions attorney shall immediately review the notice of appeal to ascertain whether the appeal properly falls within the purview of 28 U.S.C. § 1826.

If the appeal is within the purview of § 1826, the motions attorney shall immediately notify the senior judge on the motions panel that is scheduled to sit on the thirtieth day after the notice of appeal was filed. The senior judge, with the assistance of the motions attorney, shall establish a briefing schedule that will assure that the appeal can be decided within thirty days of the filing of the notice of appeal. The senior judge may request assistance from the motions attorneys in preparing a bench memorandum.

After the briefing schedule is established and a determination is made regarding staff assistance, the motions attorney shall send a memorandum to the three judges on the motions panel that is scheduled to sit on the thirtieth day after the notice of appeal was filed informing them of the appeal, the briefing schedule, and, if applicable, the name of the staff attorney assigned to the case. That panel shall hear and decide the appeal regardless of whether a motion for extension of time beyond the thirty-day period is granted.

The motions attorney shall maintain a separate calendar of appeals under 28 U.S.C. § 1826 to permit appropriate status reports.

#### **6.7. Criminal Justice Act Vouchers**

Vouchers claiming compensation for services rendered in this court under the Criminal Justice Act (CJA), 18 U.S.C. § 3006A, shall be filed with the Clerk of this court no later than 45 days after the final disposition of the case in this court or after the filing of a petition for certiorari, whichever is later. Counsel are encouraged to submit only one voucher in each appeal, including in that one voucher claims for any petition for rehearing, petition for rehearing en banc, and petition for writ of certiorari. This not only reduces the processing burden on the court and thereby expedites voucher approval, but also allows a more informed determination whether the appeal is "extended or complex" or whether the compensation available is limited by the statutory maxima set forth in the Criminal Justice Act. (rev. 3-24-04)

All vouchers must be accompanied by one copy of a completed CJA Information Summary Form, which shall be provided to counsel along with the voucher. As noted in the CJA Information Summary Form, counsel may also submit a detailed explanation along with the form to substantiate the amount requested.

The Clerk shall review each appellate voucher, make computation corrections, make comments concerning the voucher and its compliance with pertinent statutory and administrative guidelines, and send the voucher to the Appellate Commissioner

for certification of such compensation as the Appellate Commissioner deems reasonable and appropriate under the Criminal Justice Act. If the Appellate Commissioner concludes that an amount less than that requested by the attorney is appropriate, the Appellate Commissioner shall communicate to the attorney the basis for reducing the claim. The Appellate Commissioner will offer the attorney an opportunity to respond regarding the propriety and reasonableness of the voucher before approving a reduction in the amount.

If the amount requested is reduced, and the attorney seeks reconsideration, the Appellate Commissioner shall receive and review the request for reconsideration and may grant it in full or in part. If the Appellate Commissioner does not grant reconsideration, the request shall be referred to and decided by: (1) the authoring judge of the merits panel if the case was submitted to a merits panel; or (2) the appropriate administrative judge if the case was resolved before submission to a merits panel.

If the Appellate Commissioner certifies payment in excess of the statutory maximum provided by the Criminal Justice Act, the Clerk shall forward the voucher to the appropriate administrative judge for review and approval.

The Clerk shall inform counsel of the procedures and criteria for requesting compensation. The Clerk shall require counsel to complete a CJA Information Summary Form before processing the voucher.

In cases where an amount in excess of the statutory maximum provided by the Criminal Justice Act for attorney and non-attorney services in the district court is claimed by an applicant, the district court shall forward to the Clerk of this court the voucher indicating the amount certified. If the district court certifies payment for the full amount claimed by the applicant, the Clerk, upon receipt of the voucher, shall transmit it to the appropriate administrative judge for approval of such compensation as is appropriate. If the district court does not certify payment for the full amount claimed by the applicant, the Clerk shall forward the voucher to the appropriate administrative judge for approval of such compensation as is appropriate.

#### **6.8. Applications for Extraordinary Writs (Exclusive of Habeas Corpus)**

##### **(a) General Procedures**

An application for writ of mandamus or writ of prohibition shall not bear the name of the district judge concerned. Rather, the appropriate district court shall be named as respondent.

An application for extraordinary writ, whether addressed to an individual judge or to the court, shall be deemed addressed to the court. Subject to the following provisions, such an application shall be processed by the Clerk and the motions attorney in the same fashion as a motion referred to a motions panel.

If the panel determines that the writ should not be granted, it shall deny the application forthwith. Such summary denial shall not be regarded as a decision on

the merits. Otherwise, the panel shall direct that an answer and reply may be filed within the times fixed by the court. The panel may also issue a stay or injunction pending further consideration of the application. Further proceedings thereafter shall be had as provided in Fed. R. App. P. 21(b).

After receipt of the answer and reply, or expiration of the times set therefor, the application will be sent to a new motions panel unless the first panel directs otherwise. The panel may grant or deny the application or set it for oral argument. The panel may hear oral argument or direct that the application be calendared in accordance with the provisions set forth in Chapter 3.

**(b) Emergency Procedures**

If by reason of emergency, it is necessary that such an application be first brought to the attention of an individual member of the court, that judge may issue an order granting temporary relief to permit the matter to be considered by a motions panel, may decline to act, or may order that an answer be filed. Should the judge determine that immediate action on the merits is necessary, he or she shall call on a second member of the court and together they may grant or deny the application. Except in the most extreme emergencies, the judges shall not grant an application without first requesting a response. The judges shall immediately notify the motions attorney of such action.



## **6.9. Certification of Orders and Memoranda Dispositions**

A judge may direct the Clerk, a designated deputy clerk, a staff attorney, a circuit mediator, or an appellate commissioner to file an order or a memorandum disposition that has been approved by the judge or judges whose name(s) appears therein. In appropriate circumstances, the judge may send a written confirmation to the Clerk following such certification. Separate written confirmation is not necessary when the judge transmits an order to the Clerk by electronic mail. *(Rev. 1/1/2000)*

## **6.10. Motions for Clarification and Petitions for Reconsideration or Rehearing** [Abrogated 7-1-2003.]

## **6.11. Motions for Rehearing En Banc**

The Clerk shall enter the receipt or filing of a motion for rehearing en banc of a motion previously considered by a motions panel and transmit two copies of it to the appropriate motions attorney for processing. The Clerk shall retain the remaining copies until further direction by a judge or motions attorney. In cases involving judgments of death, the Clerk shall forward all motions for rehearing en banc to Associates. If the motion was decided by opinion, copies of the motion will be circulated to all active judges. *(rev. 3-24-04)*

The motion shall be referred by the motions attorney to the panel which entered the order in issue. The panel may follow the relevant procedures set forth in Chapter 5 in considering the motion for rehearing en banc, or may reject the suggestion on behalf of the court. *(rev. 3-24-04)*

## Chapter VII.

### MEDIATION OFFICE

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#### **7.1 Purpose and Staffing**

The Circuit Mediation Program was established pursuant to FRAP 33 and Circuit Rule 33-1. The goals of the program are to facilitate the voluntary resolution of appeals in order to reduce the court's workload and to offer parties an alternative to litigation to resolve their disputes.

The circuit mediators are employed by the court to facilitate the resolution of cases and perform such other duties as the court directs. They are experienced attorneys who have extensive training and experience in negotiation, mediation and Ninth Circuit practice and procedure. In facilitating the resolution of disputes, the mediators act as adjuncts to the court and perform a traditional judicial function.

#### **7.2 Authority to Enter Orders**

The mediators are certified as deputy clerks and may enter orders as described in Appendix A. They may also issue other procedural orders that facilitate the goals of the program, including orders that require parties (or party representatives with settlement authority), counsel and any other person subject to the jurisdiction of the court to participate in settlement discussions. These discussions may take place in person, by telephone, or through written communications. Counsel shall be so

advised, and discussions shall be arranged in such a manner as to avoid burdensome time and expense requirements upon the parties and attorneys.

A motion or petition for reconsideration, rehearing or clarification of an order entered by a mediator should be referred initially to that mediator. If the mediator declines to reconsider, the motion or petition will be referred to the chief circuit mediator. Orders of the chief circuit mediator are subject to review by a panel of no fewer than two judges.

### **7.3 Cases Subject to Mediation**

The mediators may act on their own initiative in any matter pending before the court that has not been assigned to a panel. Where a panel has been assigned, they may act only with the permission and at the direction of the panel.

The Civil Appeals Docketing Statement is the primary means by which the mediators identify cases for inclusion in the mediation program. Counsel in any matter pending before the court may contact the mediation office to seek assistance in pursuing the voluntary resolution of a case. Only in extraordinary circumstances and with permission of the chief circuit mediator will the mediators participate in negotiations involving pro se litigants.

Any panel may refer a case to the mediation program at any time. Upon referral of a case, the mediator assigned to the case may enter orders related to the mediation function. In cases assigned to a merits panel, the panel may defer or vacate

submission pending the outcome of mediation.

#### **7.4     Confidentiality**

The court exercises great care to ensure strict confidentiality of the settlement process. Settlement-related information disclosed to a mediator will be kept confidential and will not be disclosed to the judges deciding the appeal or to any other person outside the mediation program participants. Documents and correspondence related to settlement shall be maintained only in the mediation office and not made part of the main Ninth Circuit case file. The mediation office may adopt additional procedures to protect confidentiality.

#### **7.5     Imposition of Sanctions**

The chief circuit mediator may enter orders to show cause regarding sanctions to address issues that arise in the mediation program. Sanctions may be appropriate if a participant willfully fails to comply with any properly issued order, including an order to attend a settlement conference, or otherwise demonstrates manifest bad faith in the mediation process. Any response to the order to show cause shall be referred to the chief circuit mediator, who may discharge it or refer it to the appellate commissioner or a panel for further action.

#### **7.6     Processing of Selected Cases**

The Clerk will refer all procedural motions in cases selected for mediation to the mediation office. The Clerk will notify the mediation office before assigning to a calendar a case that has been selected for mediation. However, absent an order staying the matter, it will be assigned in the regular course.

## Chapter VIII.

### DEATH PENALTY PROCEDURES

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#### 8.1 Capital Case Coordinator

a. **Selection** - The Chief Judge shall appoint an active judge to serve as the capital case coordinator. The Chief Judge may, for a particular case, designate an active or senior judge to serve as capital case coordinator for that case. (rev. 3-24-04)

b. **Principal Duties** - The capital case coordinator shall:

(1) respond to questions from judges and court staff regarding death penalty rules and procedures;

(2) determine whether a matter qualifies as a collateral death penalty case as defined in Ninth Cir. R. 22-2;

(3) if necessary, establish deadlines for filing dispositions with respect to subsequent petitions or motions or related civil proceedings as defined in Ninth Cir. R. 22-5(a);

(4) establish deadlines for requesting an en banc vote with respect to subsequent petitions or motions or related civil proceedings, which normally shall be one hour from the receipt by the Clerk of the disposition unless exigent

circumstances exist, in which case the capital case coordinator may establish a different time period; (rev. 3-24-04)

(5) establish, in his or her discretion, a period for exchange of memoranda, which either may be a separate period, or may occur contemporaneously with the period established for voting; (new 3-24-04)

(6) the procedure and time schedule for pooling the judges with respect to subsequent petitions or motions or related civil proceedings in which an en banc vote has been requested. The capital case coordinator shall inform the Clerk of the procedure and time schedule. Each judge shall be responsible for informing the capital case coordinator and Clerk how he or she may be contacted; and

(7) direct the Clerk, under appropriate circumstances, to draw a standby en banc court in accordance with the procedures described in Ninth Circuit Rule 35-5 to serve in the event that a majority of the eligible non-recused judges votes in favor of rehearing en banc; and (new 3-24-04)

(8) for good cause under exigent circumstances, suspend the operation of the general orders pertaining to this Chapter. (new 3-24-04)

**c. Deadline for Voting**

The deadline for voting on requests for en banc review of subsequent petitions normally shall be three hours from the receipt by the court clerk of the request for en banc rehearing unless otherwise ordered by the death penalty coordinator.

## **8.2 Duties of En Banc Coordinator**

When a panel recommends or a judge requests an en banc vote on a first petition or motion as defined in Ninth Cir. R. 22-4(a) and no execution date has been set, the en banc coordinator shall supervise the en banc process in accordance with G.O. 5.1.b.2.

## **8.3 Duties of Chief Judge**

The Chief Judge shall supervise the administration of all matters before a death penalty en banc court as defined in Ninth Cir. R. 22-3(b), except that the capital case coordinator may decide procedural matters not involving an issue before the en banc court.

## **Chapter IX.**

### **JUDICIAL PROCEDURES**

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#### **9.1 Reports by Judges on Cases Under Submission**

Each judge shall periodically report to the Chief Judge the number of cases under submission assigned to the reporting judge for the preparation of dispositions, the number of such cases in which dispositions have been written and are in circulation, and the length of time such cases have been under submission and, where applicable, in circulation. Each judge shall also report the number of three-judge district court cases to which the judge has been assigned. The authoring judge shall report orally to the court concerning the status of cases in which dispositions have not been circulated within six months of submission and cases in which dispositions have not been filed within nine months of submission. Authoring judges shall be notified by the Clerk's Office one month prior to the court meeting of cases within this category.

#### **9.2 Priorities for Consideration of Proposed Dispositions**

Judges shall normally act upon proposed dispositions submitted by other judges as soon as reasonably convenient after such dispositions have been received, and in any event, before initiating research or preparation of a proposed disposition in another case. If either of the other judges on a panel is unable to act upon a



proposed disposition within seven days of its receipt, the judge shall so notify the author within that time.

### **9.3 Delay by Visiting Judges**

If a visiting judge fails to prepare a disposition within three months after the preparation thereof is assigned, the presiding member of the panel shall write to the judge and request that he or she prepare and circulate the disposition. If a visiting judge, sitting with a panel of this court, fails to act upon a proposed disposition prepared by another member of the panel within one month after such proposed disposition has been transmitted to members of the panel, the presiding member of the panel shall write to the judge and request that he or she act on the matter.

### **9.4 Seniority of Visiting Judges**

A visiting judge shall be accorded full seniority in the listing of names in the disposition and in all other respects, except that a member of the court shall preside at court sessions and shall assign cases for the preparation of dispositions.

### **9.5 Individual Public Expression of Views**

If a member of the court wishes to express an opinion publicly on pending legislation or other matters in which, because of the nature of the matter, it might be mistakenly assumed that the opinion expressed is that of the court, it shall be made clear, in expressing such opinion, that the opinion expressed is that of such member

only. Any member so expressing an opinion in writing shall also consider the advisability of sending copies to the other members of the court.

#### **9.6 Three-Judge District Court Assignments**

Where by law it is required that a circuit judge be assigned to sit as a member of a three-judge district court, the circuit judge so assigned shall be one residing in or near the unit where the case is pending.

## **Chapter X.**

### **MEETING of COURT & EXECUTIVE COMMITTEE**

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#### **10.1. Executive Committee of the Court**

##### **a. Membership**

The Executive Committee of the court shall consist of the Chief Judge, the judge who is next eligible to serve as Chief Judge, if that judge is not currently serving as an administrative unit judge, the three administrative unit judges, and three other active judges drawn by lot from among those willing to be considered. Judges drawn by lot shall serve staggered terms of three years. A judge shall not be eligible to serve again for two years following the expiration of his or her term of service on the committee, unless that judge becomes eligible to serve as chief, next in line to be chief, or administrative judge.

Attendance at meetings is required unless excused by the Chief Judge. Four members shall constitute a quorum. The Chief Judge shall chair the Executive Committee. Judges drawn by lot who are also eligible to serve on the Judicial Council shall elect to serve on either the Executive Committee or the Council.

**b. Authority**

The Executive Committee shall have the authority to act for the Court on all administrative matters except:

- (1) workload issues, including the number of sittings, size of calendars, and requests for new judgeships;
- (2) changes in procedures for deciding cases;
- (3) rules;
- (4) bankruptcy judge and federal public defender appointments;
- (5) major personnel decisions;
- (6) major decisions concerning court buildings, space planning and utilization;
- (7) those matters the Executive Committee determines are appropriate for de novo discussion by the full Court.

The Executive Committee shall review and may make recommendations to the Court on items 1, 2, 3, 5, 6 and 7.

**c. Meetings**

The Executive Committee shall meet every other month for a full-day meeting, unless canceled by the Chief Judge. Special Executive Committee meetings may be called by the Chief Judge at any time, or upon the written request of a majority of the members of the Executive Committee.

**d. Agendas and Minutes**

The agenda and minutes of the Executive Committee will be distributed promptly to the full Court.

**10.2. Court Meetings**

**a. Time, Place, and Judicial Participation**

Court of appeals meetings shall be held at such times and places as the Chief Judge shall determine. However, no fewer than four meetings shall be held each year. Special court meetings may be called by the Chief Judge at any time, and shall be called by the Chief Judge upon the written request of a majority of the active judges.

All active judges are expected to attend court meetings unless excused by the Chief Judge. A majority of the active judges shall constitute a quorum. Senior judges who elect to attend court meetings, unless excused by the chief judge, may vote. Those senior judges who do not so elect may not vote.

**b. Agenda and Non-Agenda Items**

(I) A written agenda shall be prepared and distributed to each member of the court in advance of each court meeting. The agenda items will include any of those items listed in General Order 8.1.b.1-7 that are ready for consideration by the Court, and any other actions taken by the Court Executive Committee if seven or more active or senior judges request such consideration 14 days prior to the court meeting,

or within a reasonable time if circulation of the agenda is delayed.

(ii) If a proposal for a new or amended rule of court is on the court agenda and copies have been circulated at least 10 days prior to the meeting, any judge who wishes to offer a substantive amendment to the rule must circulate the proposed amendment along with a memorandum explaining the purpose of the amendment at least three (3) days in advance of the court meeting. The Chief Judge shall resolve any disagreement regarding whether a proposed amendment is substantive.

(iii) Any matter not on the agenda, including a proposed substantive amendment to court rules, may be considered at a court meeting upon the agreement of two-thirds of the active judges present.

**c. Minutes**

Proposed minutes of court meetings shall be distributed to the active judges for correction. Any corrections shall be suggested to the Court Executive within ten (10) days of the distribution date. Upon the expiration of that period, the minutes shall become final. The final minutes of court meetings shall be distributed to all members of the court.

**10.3. Mail Votes**

Between meetings, the court may act by mail vote. On the request of any active judge, any matter submitted for a mail vote shall be withdrawn and, at the discretion of the Chief Judge, either set for a teleconference meeting or placed on the agenda for the next scheduled court meeting.

## **Chapter XI.**

### **DUTIES of ADMINISTRATIVE UNIT JUDGES**

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#### **11.1 Duties of the Administrative Unit Judge**

The duties of the administrative unit judges are:

- (1) Serve as members of the Court Executive Committee.
- (2) Attend all Court Executive Committee meetings, Court meetings, Judicial Conferences of the Ninth Circuit, Mid-Winter Workshops, and, if invited, District Conferences within unit.
- (3) Rule on excess CJA fee requests from unit.
- (4) Be attentive to Court of Appeals support services and facilities within unit (includes reviewing space needs, facility improvements, arrangements for visiting judges chambers, and security), and make recommendations to the Chief Judge. Arrange for circuit court representation on all District Security Committees within unit.
- (5) Attend installation of district, bankruptcy and magistrate judges (or secure a representative from unit).
- (6) Represent court at admission to our bar ceremonies within unit.

(7) Oversee project involving cameras used during circuit court arguments within unit.

(8) Maintain contact with Court of Appeals judges within unit and report on their needs.

(9) Serve as liaison with bar associations within unit and arrange meetings with Lawyer Representatives and Court of Appeals judges.

(10) If most senior judge eligible to become the Chief Judge, serve on Judicial Council.

(11) Rule on objections to circuit mediator orders entered in cases arising within the unit.

(12) Organize draw for selection of circuit judge on three-judge district courts for cases arising in unit.

(13) Make appointment for circuit judge member of District Committee selecting Lawyer Representatives within unit.

(14) Make appointments of circuit judges to state-federal judicial councils, monitor their progress, and make recommendations for improvement in the effectiveness of the councils, within unit. In any state where there are two administrative unit judges, the most senior administrative unit judge shall make the appointment.

(15) Perform other duties, as requested, by the Chief Judge or the Court.



## **Chapter XII.**

### **MISCELLANEOUS PROVISIONS**

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#### **12.1. Seal and Process**

The seal of the court shall be circular and shall contain the words "United States" on the upper part of the outer edge, and the words "Court of Appeals" on the lower part of the outer edge, running from left to right; and the words "Ninth Circuit" in two lines, in the center, with a dash beneath. All process of this court shall be in the name of the President of the United States and in like form as process of the Supreme Court of the United States.

#### **12.2. Use of Court, Conference, and Robing Rooms**

The court, conference, and robing rooms of the court, when not required for use by the court, may be used for other appropriate purposes upon order of the Chief Judge or administrative judges.

#### **12.3. Information Concerning Presentation of Oral Argument**

Before oral argument, the Clerk shall inform the parties that the judges on the panel have read the briefs and that the parties shall take this into account in making their oral argument. The Clerk shall also inform the parties of the time limits for

argument and the procedure to be followed in the event they wish to discuss authorities not cited in the briefs.

#### **12.4. Bar Admission Fees**

##### **a. Bar Admission Fees**

The admission fee to the bar of this court is set at \$40.00. The fee is waived for attorneys who are employed by the federal government or a federal or community public defender program; such attorneys are conditionally admitted. If the attorney leaves government service but wishes to practice before the Court, that attorney must then satisfy the fee requirement. Court employees are exempt from the admission fee.

##### **b. Expenditures from the Attorney Admission Fund**

All expenditures must be in accordance with the Plan for Administration of the Attorney Admission Fund.

The circuit executive or the Clerk, may authorize expenditures from the Fund for items contained in the approved annual budget and for revolving fund expenditures that do not exceed \$1,500 per item. Any single expenditure for a budgeted or revolving fund item exceeding \$1,500, requires the additional approval of the Chief Judge or the Chair of the Committee.

The Chief Judge is authorized to approve expenditures from the Fund in any amount within the Chief Judge's annual budget limit. The Chief Judge may delegate this authority to the circuit executive or to the Clerk. See, Plan for Administration of Attorney Admission Fund.

#### **12.5. Discipline of Attorneys Admitted to Practice in This Court**

The Clerk shall periodically check the lists forwarded to the court concerning state disbarments and suspensions against the roll of attorneys practicing before this court. If it is discovered that any member of the bar of this court has been disbarred or suspended from the practice of law by any court or other competent authority or resigns during the pendency of disciplinary proceedings, the Clerk or a designated deputy shall assign a docket number to the matter and shall issue an order instructing the attorney to resign within twenty-eight (28) days from the entry of the order from the bar of this court or show cause why he/she should not be suspended or disbarred from practice in this court. The order shall warn the attorney that failure to respond in a timely fashion will result in removal from the roll of admitted attorneys without further notice. A motions attorney, upon receipt of the response thereto, shall present the matter to a current motions panel for appropriate action pursuant to Ninth Circuit Rule 46-2. If the attorney fails to respond to the order to show cause, the Clerk shall order that the attorney be removed from the roll of attorneys eligible to practice before the court.

If the court becomes aware of a violation of the applicable rules of professional conduct or a failure to comply with the rules or orders of this court, or of any other conduct unbecoming a member of its bar, the court may assign a docket number to the proceedings and take such disciplinary action as it deems necessary pursuant to Fed. R. App. P. 46 and Ninth Circuit Rule 46-2.

#### **12.6. Use of General Orders**

These General Orders pertain primarily to the court's internal functioning and therefore do not have standing as rules of the court. Nevertheless, such orders shall be regarded as public records and shall be available, during office hours, for public inspection at the offices of the Clerk of this court and all district courts of the circuit. The Clerk shall provide each member of the court and visiting judge with a loose-leaf book containing the General Orders. Copies of the General Orders may be purchased, upon request, from the Court of Appeals Clerk's Office in San Francisco.

#### **12.7. Distribution of Briefs, Records, and Exhibits After Use**

Since copies of briefs, memoranda, and records, after argument or consideration, may contain comments and notations by the judges, such documents generally are not to be made available to anyone other than court personnel. However, original clerk's records, original and any copies of reporter's transcripts, and exhibits shall be returned to the district court.

## **12.8. Prisoner Mail**

When mail addressed by the Clerk to a prisoner in a state or federal institution is returned undelivered, the Clerk shall forward the returned mail to the appropriate state or United States Attorney. The Clerk shall include a letter with the returned mail instructing the attorney to use all reasonable means to effect delivery to the prisoner and to submit to the Clerk proof of such efforts and the results thereof within fourteen (14) days.

Mail addressed by a prisoner to a member of the court shall be opened by the Clerk who shall act on any procedural matter as appropriate. All substantive matters shall be forwarded to the court.

## **12.9. Sua Sponte Imposition of Sanctions**

### **a. Sanctions Imposed Against Counsel or a Party**

Sanctions may be imposed against counsel or a party for conduct that violates the Federal Rules of Appellate Procedure, the Circuit Rules, orders or other instructions of the court, the rules of professional conduct or responsibility in effect where counsel maintains his or her principal office or as authorized by statute. If sanctions appear to be warranted, the following procedures shall apply.

An appellate commissioner may issue an order to show cause that directs a litigant to pay a sanction in the amount determined by the court or to show cause why such sanctions would be unwarranted. The order shall state the grounds for

such sanctions, the authority under which such sanctions are authorized, whether the sanction would be imposed against counsel, a party or both, and the date upon which a response shall be filed. Any reply to a response shall be filed within seven (7) days from service of the response. Upon review of the response and reply, if any, the appellate commissioner may discharge the order or may refer the response to the merits panel or motions panel for an determination as to the propriety of sanctions. All dispositions in which orders to show cause have been issued shall specifically address any response or failure to respond to the order.

A motions or merits panel may issue an order to show cause that directs a litigant to pay a sanction in the amount determined by the court or to show cause why such sanctions would be unwarranted. The order shall state the grounds for such sanctions, the authority under which such sanctions are authorized, whether the sanction would be imposed against counsel, a party or both, and the date upon which a response shall be filed. Any reply to a response shall be filed within seven (7) days from service of the response. Upon review of the response and reply, if any, the panel may deem the order to be discharged or may impose the sanction.

**b. Court Reporter Sanctions**

If a court reporter has failed to prepare previously designated transcripts, and has not responded to a prior warning order, the Clerk shall prepare an order to show cause regarding sanctions for the appellate commissioner. Copies of the order shall

be provided to the chief district judge, appropriate district court personnel, and the reporter regulatory agency. Upon review of the response, the commissioner may either discharge the order or refer the response to a merits panel or motions panel for a determination regarding the imposition of sanctions.

When it comes to the attention of a motions panel that a reporter has failed to prepare previously designated transcripts, the panel shall order the reporter to show cause why sanctions should not be imposed or may refer the matter to the Clerk. If the motions panel orders the reporter to show cause, the panel shall review the response and shall either deem the order to be discharged or order the imposition of a fine.

When it comes to the attention of a merits panel that a reporter has failed to prepare previously designated transcripts, the panel shall order the reporter to show cause why sanctions should not be imposed. If the appeal is ordered off the calendar, the panel shall refer the matter to the Clerk. If the merits panel orders the reporter to show cause, the panel shall review the response and shall either deem the order to be discharged or order the imposition of a sanction.

#### **12.10. District Court Communication**

When a district court judge is aware of a mistake in a disposition by this court involving an appeal from that judge's decision, has reason to believe that the affected parties may not point out the mistake, and thinks that justice will be

disserved if the mistake is not corrected, that judge may bring the mistake to the attention of this court by way of a letter addressed to the clerk. The clerk shall distribute the letter to the members of the panel or as is otherwise appropriate. The district judge shall provide copies of the letter to all parties to the appeal.

When a district court wishes to comment on a pending petition for a writ of mandamus or other extraordinary relief that arises out of one of that judge's cases prior to the entry of an order requiring a response, the judge shall send a letter to the clerk for distribution to the panel that will review the petition. The judge shall provide copies of the letter to petitioner and the real party in interest.

#### **12.11. Suspension of General Orders**

Any active judge may request that the court vote to suspend a provision or provisions of these orders, except to the extent that any suspension would be prohibited by law. The request shall be directed to the Chief Judge. The Chief Judge shall place the matter on the agenda for the next court meeting. If time constraints demand a more immediate resolution of the matter, the Chief Judge shall call for a mail vote. The call shall include a time limit set at the Chief Judge's discretion within which the judges must submit their votes. Any proposed suspension must be approved by the number of votes that equals or exceeds two-thirds of the eligible judges. Any proposed suspension shall state the period for which the suspension will apply.



## **12.12. Confidentiality**

No past or present officer or employee of the court may divulge or make available information relating to a matter pending before the court during or prior to the term of that individual's service that is both learned as a result of that individual's official duties and not part of the public records of the court, unless the disclosure is made:

- (a) To a person who is a judge or an officer or employee of the court at the time the disclosure is made, or was a judge or an officer or employee of the court at the time the information was obtained;
- (b) Pursuant to a statute, rule or order of the court, or authorization from a judge;
- (c) Pursuant to a valid order or subpoena issued by a body competent to issue such an order or subpoena; or
- (d) To report an alleged criminal violation to an appropriate law enforcement official.

For the purposes of this section, "information relating to a matter" shall include information:

- (a) That is received by the court pursuant to a protective order or under seal;

- (b) Learned in connection with any case which has been or is before the court which a judge expressly marks "confidential" or states is to be kept confidential pursuant to this section;
- (c) That relates to the deliberative processes of the court in a case that is in the process of being decided or has already been decided. Examples of such information are:
  - (1) Draft opinions prepared in connection with the preparation by the court of a final opinion;
  - (2) Internal memoranda, in draft or final form, prepared in connection with a draft or final opinion or argument of a case before the court; and
  - (3) The substance or occurrence of conversations among judges or between a judge and officers or employees of the court concerning the substance of the case which the court is in the process of deciding, is about to decide, or has decided.